

Employment Alert
Employment News

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On 9 November 2017, the Official State Gazette published Law 9/2017, of 8 November, on Public Sector Contracts, transposing the European Parliament and Council Directives 2014/23/EU and 2014/24/EU of 26 February 2014 (hereinafter referred to as "LCSP").

This Law, of an administrative scope and whose entry into force is scheduled for March 9th of this year, introduces important new social and employment issues which, in a succinct manner, are set out below.

a. - Objectives of the LCSP

The LCSP aims to introduce greater efficiency in public procurement in Spain, redesigning the award criteria and including qualitative, environmental and social aspects related to the subject matter of the contract.

The Community Directives transposed into Spanish law by means of the LCSP have, among other objectives, the aim of increasing the efficiency of public expenditure, facilitating the participation of SMEs in public procurement and allowing public authorities to use procurement to support common social and environmental objectives.

For this reason, the new LCSP reinforces the guiding principles of public sector contracting (transparency, advertising, equality, non-discrimination and free competition) and also simplifies procedures to reduce administrative burdens and facilitate access to SMEs.

b. - Main developments of the LCSP in the employment field

The main impacts on employment law of the new LCSP are as follows:

i. - Obligation of the awarded company to comply with the sectorial treaty regulations:

Throughout the LCSP there are several references to the sectoral agreement (and not the company agreement) as an agreement to be taken into account by companies that want to qualify for service concession contracts with the Public Administration.

Therefore, the new LCSP requires that the reference regulation for companies wishing to bid for public contracts be the sectoral agreement, thus displacing the possible company agreement that has generated controversy by dissipating the priority application of the company agreement that introduced the RDL 7/2011, of 10 June, urgent measures for the reform of collective bargaining and, more forcefully, the aforementioned Employment Reform of 2012.



The aim of this measure is to avoid a reduction in the working conditions of workers who, by means of an invitation to tender from their companies, are included in the contractual sphere of the Administration.

ii. Subrogation in employment contracts and information obligations:

Where the successful tenderer is subject to a legal, contractual or collective bargaining agreement of general effectiveness, or an obligation to subrogate itself in certain employment relationships, the contracting authorities must provide the tenderers (in the tender dossier itself) with information on the terms and conditions of the employees' contracts which are affected by the subrogation which is necessary to enable labour costs to be assessed. To this end, the company that carries out the service subject of the contract to be awarded and that has the status of employer of the workers concerned shall be obliged to provide the following information:

a.- Listing of the personnel subject to subrogation together with details of category, type of contract, working day, seniority date, expiry of the contract, gross annual salary of each worker.

b. - The collective agreement of application, as well as all the agreements in force applicable to workers affected by subrogation.

If, once the subrogation has taken place, labour costs are higher than those indicated by the former contractor to the contracting authority, the contractor shall have direct action against the former contractor.

iii. - Remunicipalization of services by the Public Sector:

The obligation of subrogation in employee contracts, whether there is a legal obligation (business succession), contractual or deriving from a generally effective collective bargaining agreement, also applies in the event that a public administration reverses/remunicipalises the service. The remunicipalization consists of recovery by the Administration of services that were being developed by private companies.

Therefore, in the cases in which a succession of company ex-article 44 of the Workers' Statute occurs due to the remunicipalization of the service, the Administration must subrogate itself in the contracts of the workers who have been carrying out this activity. Greater doubts arise as to whether an ex-Convention or a general agreement is a successor to an ex-Convention, since in principle the Administration would fall outside its scope of application.

The subrogation of workers by the Public Administration raises serious questions about their legal status. Additional Provision 26 and 34 of the General Law of State Budgets (Ley General de los Presupuestos del Estado - LPGE) does not allow the Public Administration to automatically incorporate workers as public employees, since they must have access to vacancies through a competition where the principles of equality, merit and capacity are governed. It is therefore not clear whether the subrogated workers will become (a) indefinite, non-regular workers or (b) a freeze on the private legal status as a new category known as "subrogated personnel", so we will have to wait for our courts' forthcoming pronouncements on this matter.

iv. - Impossibility of subrogation imposed by public tender specifications:

Public procurement contracts may not impose ex novo subrogation of workers. Consequently, unless the cases required by Article 44 ET or imposed by a Collective Bargaining Agreement occur, the specifications shall not have such power.

v. - Redefinition of the principles to be taken into account in public procurement:

The price and budget of the tender must include a breakdown, with gender and occupational category breakdown, of the estimated wage costs based on the reference employment agreement.

One of the fundamental objectives pursued by the new LCSP is greater transparency in tendering procedures, while at the same time implementing the necessary mechanisms for adequate protection of workers and compliance in general with social and employment obligations; to this end, the criterion of the most economically advantageous offer is replaced by that of better value for money.

There are also numerous instruments designed to promote equality and non-discrimination of certain groups. In particular, it will be possible to apply social criteria of tie-breaking in the face of equality of offers (disabled persons, gender, etc.), to require specific labels as a means of proving compliance with certain social requirements (e. g. equality mark). Finally, those companies obliged to have an Equality Plan must comply with this obligation in order to contract with the Administration.

vi. - Establishment of coercive measures (fearlessness, reckless dismissal, termination of contracts, etc.) to guarantee compliance with employment obligations:

In order to strengthen workers' employment guarantees, coercive measures are established to penalize non-compliant contractors, such as:

a. - Possibility of rejecting abnormally low bids (referred to as "reckless dismissals") if they are found to be due to non-compliance with social or employment obligations.

b. - Prohibition of contracting with entities that have been sanctioned for very serious infraction in employment matters, as established in the Law on Offenses and Penalties in the Social Order, as well as in employment integration matters, or condemned for a crime against the rights of workers.

c. - Prohibition of contracting with those entities with more than 50 workers who do not meet the requirement that at least 2% of their staff are disabled workers.

d.- Imposition of penalties of up to 10% of the contract's budget, or even its termination, in the event of non-compliance or defective compliance with the special execution conditions established by the contracting authorities, which may relate, among other things, to the promotion of employment among people with particular difficulties of insertion in the employment market, to the elimination of employment inequalities between men and women, to the fight against unemployment, to the promotion of training in the workplace, and with character.

c. - Entry into force and application

The entry into force of the LCSP will generally take place 4 months after its publication, i.e. **9 March 2018**.

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